Filed 7/16/12 P. v. Cruz-Avianeda CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMUNDO CRUZ-AVIANEDA,

Defendant and Appellant.

2d Crim. No. B224694
(Super. Ct. No. 1297322)
(Santa Barbara County)

Raymundo Cruz-Avianeda appeals his conviction, by jury, of assault with intent to commit rape (Pen. Code, § 220, subd. (a)),[1] a lesser included offense of the charged crime of rape. (§ 261, subd. (a)(2).) The trial court sentenced appellant to a term of six years in state prison. He contends the trial court erred when it failed to instruct the jury on the lesser included offense of attempted rape. (§ 664/261.) He further contends the trial court erred in its imposition of certain fines and penalty assessments. We order the trial court to amend the abstract of judgment. In all other respects, the judgment is affirmed.

Facts

J.M. is a 50-year-old housekeeper who, in 2009, lived in an apartment on the grounds of her employer's home in Santa Barbara. Her adult daughter, A., lived in

[1] All statutory references are to the Penal Code unless otherwise stated.

the apartment with J.M. A. has a young daughter. Appellant is the father of that child. The apartment had one bedroom, which J.M. allowed her daughter and granddaughter to share. She converted a large closet into a bedroom for herself. There was a lock on the inside of the closet door.

In June 2009, A. and her daughter were out of town. Appellant showed up at J.M.'s apartment with cash to pay child support. He drove J.M. to a Western Union office, to wire the money to A. Later that evening, appellant drove J.M. to and from church.

Once they were back at the apartment, appellant asked to stay the night, complaining that it was too late to drive back to his home in Oxnard. J.M. agreed to let him stay. After she had changed into her pajamas for bed, appellant asked J.M. to listen to a voice mail on his cell phone. The message was in English, which neither of them spoke well. J.M. told him what she thought the message said and then returned to her bed. Appellant followed her. At first, he tried to massage her feet. J.M. pushed him off and told him to go to sleep. Appellant put his hand on J.M.'s shoulder. She took his hand off and moved away. He got on top of her and the two began to struggle. Appellant grabbed J.M.'s breast and tried to kiss her. Eventually he removed her pajama bottoms and underwear and was able to "grope" her vagina.

When she was exhausted from struggling, J.M. stopped moving. Appellant removed his own pants. The tip of his penis briefly went inside her vagina. J.M. testified that, just when appellant was "about to penetrate" her, she told him she would have sex with him, but not in the closet. She convinced appellant to get a blanket and go into the living room, where they would have sex. He agreed. When he left, J.M. closed and locked the closet door. Appellant spent several minutes urging J.M. to come out. He finally gave up, went into the living room and fell asleep on the couch.

J.M. left the closet at dawn and found appellant asleep on the sofa. She asked him to leave. He asked her not to be angry with him. J.M. left for work. Later that day, she called A. and told her what had happened. She also told her sister. Although at

first she did not want to report the incident to police, she became convinced that she should do so, to protect her granddaughter. Nine days later, J.M. reported the attack to police.

J.M. was first interviewed by Officer Lombardo, who does not speak Spanish. Because J.M. does not speak English well, Officer Lombardo asked another police department employee to act as an unofficial translator. During this interview, J.M. told Lombardo that appellant tried to penetrate her vagina with his fingers and his penis. Lombardo was not sure J.M. understood his questions, so he asked Officer Jaycee Hunter, who speaks fluent Spanish, to continue the interview. In response to Office Hunter's questions, J.M. said that appellant pushed her down, forcibly removed her pants and put his fingers and his penis into the entrance of her vagina.

Officer Hunter arranged to be at J.M.'s apartment when appellant came to drop off child support money. Appellant agreed to talk to Officer Hunter and initially denied any kind of sexual interaction with J.M. He later admitted that he tried to massage her foot. Eventually, appellant gave a description of the events that was very similar to J.M.'s. He said that he knew J.M. was not consenting to have sex with him because she kept saying, "no." Appellant also admitted that he had touched her breasts, removed her clothes and had touched, but did not penetrate, her vagina with his fingers and his penis. Throughout the interview, appellant maintained that they did not have sex and that J.M. was "not that angry" about the incident.

At the urging of police officers, J.M. telephoned appellant and tried to get him to talk about the assault. He told her that he couldn't really remember the incident because he had been drunk and high on cocaine that night. Appellant also told J.M. that "nothing happened" that night. He later said, "If you hadn't wanted to and I wasn't cooling down you would have called the police[.] You would have fucked my shit up. A kick in the nuts you'd say, like, say, a fucking kick in the nuts."

Jury Instructions

Appellant's trial counsel requested that the court instruct the jury on attempted rape as a lesser included offense of the charged crime, rape. The trial court declined to do so. It concluded instead that assault with intent to commit rape was a "more appropriate" lesser included offense, because "there's alleged to be an assault in this case. You would give the attempted rape if there was -- if there was an act, an overt act that was committed pursuant to an effort to commit a rape but it didn't involve any use of force."

The trial court instructed the jury, in terms of CALCRIM No. 1000, that it could find appellant guilty of the charged crime of rape only if the People proved that, "1. The defendant had sexual intercourse with a woman; [¶] 2. He and the woman were not married to each other at the time of the intercourse; [¶] 3. The woman did not consent to the intercourse; [¶] AND [¶] 4. The defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman." The jury was further instructed: "*Sexual intercourse means* any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required." (CALCRIM No. 1000.)

The jury was instructed, in terms of CALCRIM No. 890, that the lesser included offense of assault with intent to commit rape required the People to prove, "1. The defendant did an act that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] 4. When the defendant acted, he had the present ability to apply force to a person; [¶] AND [¶] 5. When the defendant acted, he intended to commit Rape." (CALCRIM No. 890.)

During its deliberations, the jury asked for clarification "on the issue of penetration[.] Specifically, does touch with the penis to the vagina/genitalia, no matter

how slight, constitute penetration?" The trial court responded with a special instruction: "Any penetration, however slight, of the vagina or genitalia by the penis is sufficient to complete the crime of rape (assuming this element and all other elements have been proven beyond a reasonable doubt.) In other words, the crime of rape is committed by any penetration of the penis into the female genitalia. [¶] However, mere touching of the penis to the female genitalia without penetration as defined above is not sufficient to constitute the crime of rape."

The jury was unable to reach a verdict on the charged offense. With the agreement of trial counsel, the court instructed it to move on to a consideration of the lesser included offenses. Soon thereafter, the jury returned with its verdict of guilty on the offense of assault with intent to commit rape.

Discussion

Appellant contends the trial court erred when it declined to instruct the jury on attempted rape as a lesser included offense of rape. There was no error.

A trial court has a sua sponte duty to instruct on all theories of a lesser included offense which find substantial support in the evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) In this context, substantial evidence is evidence from which a reasonable jury could conclude that only the lesser offense had been committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] ' there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*." (*People v. Memro* (1995) 11 Cal.4th 786, 871, quoting *People v. Morrison* (1964) 228 Cal.App.2d 707, 712.) "On the other hand, if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given." (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.)

Assault with intent to commit rape and attempted rape are both lesser included offenses of rape. (*People v. Atkins* (2001) 25 Cal.4th 76, 88; *People v. Dixon*

1999) 75 Cal.App.4th 935, 942-943.) As our Supreme Court explained in *People v. DePriest* (2007) 42 Cal.4th 1, 48, "An attempt to commit rape has two elements (see § 664): the specific intent to commit rape, and a direct but ineffectual act done towards its commission. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 . . . .) Such act cannot be merely preparatory, and must constitute direct movement towards completion of the crime. (*Ibid.*) However, attempted rape does not necessarily require a physical sexual assault or other sexually ' " unambiguous[]" ' contact. (*Carpenter, supra,* 15 Cal.4th at p. 387 [pointing gun at victim and threatening rape] . . . .)" Assault with intent to commit rape combines the elements of both attempted rape and assault because the offense "requires an intent to and an unlawful attempt to have sexual intercourse by force, violence or fear of bodily injury, without consent of the victim." (*People v. Dixon, supra,* 75 Cal.App.4th at pp. 942-943.)

Appellant is entitled to have the jury instructed on a lesser included offense if there is substantial evidence from which a reasonable jury could conclude that the lesser offense was committed, but not the greater offense. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.) Here, there is no substantial evidence that appellant committed an attempted rape but not an assault with intent to commit rape. Both parties described a long, physical struggle during which appellant forcibly removed J.M.'s clothing, grabbed her breasts, and touched her vagina with both his fingers and his penis. This was a completed assault, not a "direct but ineffectual act" as required for attempted rape. Because there was no substantial evidence that appellant committed an attempted rape without also committing an assault, the trial court did not err in refusing to instruct the jury on attempted rape.

Fine and Penalty Assessment

At the sentencing hearing in this matter, the trial court stated: "I'm going to order a fine pursuant to Penal Code Section 290.3 in the amount of $1,290, and that include the penalty assessment." Similarly, the abstract of judgment prepared in this matter states, "Pay $1290 per 290.3 PC." Both appellant and respondent agree the matter

must be remanded for preparation of an amended abstract of judgment because the trial court failed to specify the amount and statutory basis for each "fine" and "penalty assessment" imposed. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.) There are several possible penalty assessments that could be imposed on a § 290. 3 fine. (See, e.g., §§ 1464, 1465.7; Gov. Code, §§ 70372, 76000, 76000.5, 76104.6, 76104.7.) The current abstract of judgment fails to specify which penalty assessments the trial court intended to impose, the amount of each assessment and its statutory basis. As a consequence, the matter must be remanded for preparation of an amended abstract of judgment. We further note that Government Code section 76104.7 was amended after appellant's original sentencing to impose a larger penalty. The increased amount may not be applied to appellant because he committed his offense before the effective date of the amendment. (*People v. Batman* (2008) 159 Cal.App.4th 587, 589-591.)

Conclusion

The matter is remanded to the Superior Court for preparation of an amended abstract of judgment specifying the amount of each individual fine and penalty assessment imposed as well as its statutory basis. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

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